Supreme Court, U.S.
FILED
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No. 99-1009

In The
SUPREME COURT OF THE UNITED STATES

SUE HARRIS DEBAUCHE,
Petitioner,

v.

EUGENE TRANI, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF AND APPENDIX

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February 18, 2000

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STATEMENT OF INTERVENING MATTER

Pursuant to Supreme Court Rule 15.8, petitioner Sue Harris DeBauche ("DeBauche") hereby submits this supplemental brief and attached appendix presenting intervening matter not available at the time of her last filing and further highlighting the importance of one of the questions presented in her Petition for a Writ of Certiorari (the "Petition"), namely, whether the Fourth Circuit erred in holding that prevailing party attorneys fees and costs may be awarded against Mrs. DeBauche's *pro bono* counsel or other non-parties under 42 U.S.C. §1988.

On February 1, 2000, the U. S. District Court for the Eastern District of Virginia "on remand from the Fourth Circuit" issued an Order setting a hearing on March 9, 2000, to reconsider "the award of attorneys fees and costs and the imposition of sanctions." *See* Supplemental Appendix ("SA") attached hereto, p. 1.[1] In response to that Order, respondents Clear Channel Radio, Inc., t/a WRVA and Central Virginia Educational Telecommunications, Inc., t/a/ WNVT, (the "Broadcaster Respondents") filed a joint Memorandum in Support of Attorney's Fees on Remand. SA 2. The issues raised in the Memorandum and the matters to be decided by the District Court directly relate to the second question presented in the Petition in this case as to whether the Fourth Circuit was correct as a matter of law in permitting an award of prevailing party attorney's fees under 42 U.S.C. §1988 to be apportioned between a civil rights plaintiff and her *pro bono* counsel and/or, in the words of the Broadcaster Respondents, the "driving

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[1] All citations to the Supplemental Appendix attached to this Supplemental Brief are cited herein as "SA" followed by the page number referencing the document cited.

force" behind the lawsuit. SA 8.[2]

In a joint Memorandum submitted to the District Court on February 14, 2000, the Broadcaster Respondents (who waived filing any submission to this Court on the Petition) specifically ask the District Court to "apportion the attorneys fee award under 42 U.S.C. §1988 to Clear Channel and CVETC such that Sue Harris DeBauche is personally and solely liable for 5% and her attorneys are liable, jointly and severally amongst themselves only, for 95% of the award." SA at 2-3. They justify their request based on the Fourth Circuit holding which, in their words, allows the District Court "to consider the financial resources of DeBauche and, if necessary, split responsibility for payment of the fee award between DeBauche and her attorneys," citing the panel majority's opinion at 191 F.3d at 511. SA 6. Noting that DeBauche has filed her Petition for a Writ of Certiorari in this case, they continue: "Unless and until that petition and appeal are resolved, this Court is bound by the Fourth Circuit's determination that the Section 1988 award may be taxed to DeBauche's attorneys." Id.[3]

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[2] The Fourth Circuit panel majority indicated the District Court could consider "[Ms. DeBauche's] resources or her backing for this lawsuit" in awarding costs under 42 U.S.C. §1988. Appendix to Petition at 22.

[3] Having never made a timely motion for Rule 11 sanctions, the Broadcaster Respondents now urge the Court to award sanctions against the *pro bono* attorneys under its "inherent powers," notwithstanding the fact that an "inherent powers" motion was previously made and adjudicated by the District Court. That motion resulted in an award of sanctions *only* under 28 U.S.C. §1927, a ruling that was reversed by the Fourth Circuit. A separate motion for sanctions filed in the Fourth Circuit and the Broadcaster Respondents'

The Broadcaster Respondents also urge upon the District Court the novel notion that "[a] fee award may be assessed against a non-party who is the "driving force" behind the litigation," relying upon *Public Interest Bounty Hunters v. Board of Governors of the Federal Reserve System*, 548 F. Supp. 157 (N.D. Ga. 1982) SA 8. This argument is remarkably similar to the question presented in *Donald E. Nelson v. Adams USA, Inc., et al.*, 175 F.3d 1343 (Fed. Cir. 1999), *cert. granted*, ____ U. S. ____ (U.S. November 29, 1999) (No. 99-502), where prevailing party fees were assessed against a non-party. In the present case, the Broadcaster Respondents contend that "the substantial resources martialled by an allegedly impecunious plaintiff suggest that The Rutherford Institute and the Reform Party were the "driving force" behind plaintiff's suit." SA 8. Respondent L. Douglas Wilder also asks the District Court to conduct an evidentiary hearing "to determine the financial resources available to plaintiff, either through her personal resources of [sic] those backing this lawsuit . . .", pointing out that the record does not contain "factual information on the ability of plaintiff's counsel, or those affiliated with her counsel to pay the fees that have been incurred as a result of this meritless lawsuit." Brief in Support of Claim for §1988 Attorneys Fees, (pp.4-5) filed by Wilder in the District Court on remand.[4]

Bills of Cost were also denied and no appeal was made of any of these rulings.

[4] At the same time, Wilder has represented to this Court that he does not have a "position *in this Court* as to whether the fees should be awarded jointly and severally against Petitioner and her <u>*pro bono*</u> counsel." Brief in Opposition, p. 15 (emphasis added).

SUMMARY OF ARGUMENT

The attempt by these respondents in newly initiated proceedings in the District Court to seek apportionment of prevailing party attorneys fees under 42 U.S.C. §1988 between Mrs. DeBauche, her counsel and/or other "non-parties" highlights the significance and importance of the conflict between the Circuits on this issue and suggests that the issue of awarding prevailing party attorneys fees against counsel or other non-parties should be considered by this Court in connection with this Court's consideration of the same issue in *Donald E. Nelson v. Adams USA, Inc., et al.*, 175 F.3d 1343 (Fed. Cir. 1999), *cert. granted*, ____ U. S. ____ (U.S. November 29, 1999) (No. 99-502).

ARGUMENT

THE PROCEEDINGS INITIATED BY RESPONDENTS ON REMAND IN THE DISTRICT COURT TO OBTAIN PREVAILING PARTY ATTORNEYS FEES FROM MRS. DEBAUCHE, HER *PRO BONO* COUNSEL AND/OR OTHER "NON-PARTIES" HIGHLIGHT THE IMPORTANCE OF THE CONFLICT OF LAW BETWEEN THE CIRCUITS, AND THE SIGNIFICANCE OF THE QUESTION, AS TO WHETHER §1988 PREVAILING PARTY ATTORNEYS FEES MAY BE AWARDED OR APPORTIONED AGAINST NON-PARTIES

The attempt to apportion prevailing party attorneys fees under 42 U.S.C. §1988 among Mrs. DeBauche, her counsel or other non-parties, based on the Fourth Circuit holding in this case, highlights the importance of the issues presented in the

Petition. This apportionment directly conflicts with the contrary holding of the Third Circuit in *Brown v. Town of Chambersburg*, 903 F.2d 274, 276-77 (3rd Cir. 1990). Moreover, it raises an important unresolved question of Federal law, as confirmed by this Court's grant of certiorari in the *Nelson* case on November 29, 1999, namely whether "prevailing party" attorneys fees may be assessed against a non-party under 35 U.S.C. §285.

The Fourth Circuit's sanction of an inquiry into Mrs. DeBauche's "backing for the lawsuit," and the subsequent action to allocate §1988 fees against The Rutherford Institute, its *pro bono* attorneys and/or The Reform Party also presents serious issues under the Petition, Speech and Association Clauses of the First Amendment for political parties, for advocacy organizations that support the prosecution of civil rights claims and for their affiliated counsel. *See NAACP v. Button*, 371 U.S. 415, 428-29 (1983), *In Re Primus*, 436 U.S. 412, 423 (1978), and their progeny.[5] The suggestion that an evidentiary hearing be conducted into the "resources available" to Ms. DeBauche --- at the behest of a billion dollar media conglomerate (Clear Channel) and a purportedly private party for state action purposes (Wilder) whose fees are being paid for by the Commonwealth of Virginia --- threatens to turn the traditional hospitality of the Federal courts to First Amendment claims on its head.[6] It is almost Kafkaesque that the present posture of

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[5] Ms. DeBauche's counsel are cooperating attorneys for The Rutherford Institute which provided <u>*pro*</u> <u>*bono*</u> counsel who represented Mr. Forbes before the U. S. Supreme Court in *Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633 (1998).

[6] The billing statements attached to Wilder's Verified Bill of Costs were not directed to him, but to "Commonwealth of Virginia, Division

this case involves the attempted punishment of the Reform Party and others when, in the face of a *bona fide Forbes* challenge to the alleged viewpoint-motivated exclusion of a duly balloted Reform Party candidate from a government-run debate, the lower courts have not even required the respondents to give any reasons whatsoever for the exclusion of Mrs. DeBauche or provided her with the opportunity to prove that the exclusion was unreasonable and viewpoint-discriminatory. If the Fourth Circuit decision is upheld, the legal remedy provided by the *Forbes* ruling will not only be eviscerated, it will be transformed into a sword to bludgeon disfavored political parties and minority candidates.

Finally, this case threatens Mrs. DeBauche's *pro bono* counsel and the other "non-parties" with irreparable due process deprivation. If this Court denies certiorari, there will be no plenary appellate review of the decision to permit apportionment of attorneys fees against non-parties under §1988 since the Fourth Circuit's *ipse dixit* ruling was made in passing without any briefing or argument of any kind and, unless reversed, becomes final in this Court (except for the mathematics of the apportionment of fees between the party and the non-parties). As a matter of justice, this Court should not countenance such a result.

CONCLUSION

For the reasons set forth in Mrs. DeBauche's Petition and this Supplemental Brief, the Petition for Certiorari should be granted and the case, reversed and remanded, as suggested in the Petition, or otherwise it should be accorded plenary

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of Risk Management, Property/Liability Unit, P. O. Box 1140, Richmond, Virginia 23208-1121, Attention: Sue Keener, Deputy Director."

consideration by this Court.

DATED: February 17, 2000.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX TO PETITIONER'S SUPPLEMENTAL BRIEF AND APPENDIX ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

SUE HARRIS DEBAUCHE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.:
	)	3:97cv770
VIRGINIA COMMONWEALTH UNIVERSITY, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

The above-captioned matter, on remand from the Fourth Circuit to reconsider the award of attorneys fees and costs and the imposition of sanctions, is set for oral argument in this Court on March 9, 2000, at 11:00 a.m. Defendants are hereby ORDERED to file their briefs by closed of business, February 22, 2000. Defendants will not file replies.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

FEB 1 2000
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

SUE HARRIS DEBAUCHE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.:
	)	3:97cv770
VIRGINIA COMMONWEALTH UNIVERSITY, et al.,	)	
	)	
	)	
Defendants.	)	

CLEAR CHANNEL'S AND CVETC'S MEMORANDUM IN SUPPORT OF ATTORNEY'S FEES UPON REMAND

Clear Channel Radio, Inc., t/a WRVA ("Clear Channel") and Central Virginia Educational Telecommunications, Inc., t/a WNVT ("CVETC") state the following in support of their claims for attorney's fees and costs upon remand to this Court by the United States Court of Appeals for the Fourth Circuit in *DeBauche v. Trani, et al*, 191 F.3d 499 (4th Cir. 1999):

ISSUES ON REMAND

Clear Channel and CVETC respectfully request relief upon remand as follows:

1. The Court should apportion the attorney's fee award under 42 U.S.C. §1988 to Clear Channel and CVETC such that Sue Harris DeBauche is personally and solely liable for 5%, and her attorneys are liable, jointly and severally amongst

themselves only, for 95% of the award.

2. The Court should sanction DeBauche's attorneys jointly and severally under its inherent power by awarding Clear Channel and CVETC their attorney's fees and costs.

3. The Court should award Clear Channel and CVETC additional fees and costs associated with this matter in an amount to be determined at the hearing set for March 9 in this matter.

PROCEDURAL HISTORY

By Memorandum Opinion dated April 13, 1998, the Court dismissed the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) and awarded defendants L. Douglas Wilder, Clear Channel, and CVETC their attorney's fees pursuant to 42 U.S.C. §1988. *DeBauche v. VCU, et al.*, 7 F. Supp.2d 718 (E.D. Va. 1998). The Court determined that "DeBauche's claims against CVETC and Clear Channel were without foundation, as the two were not even alleged to have played a role in the decision to exclude her from the debate." Mem. Op. at 13.

The Court issued its Final Order and Memorandum Opinion on September 4, 1998. Pursuant to 42 U.S.C. §1988, the Court awarded Clear Channel $13,922.80 and CVETC $23,935.70. The Court also ruled that the judgment in favor of CVETC and Clear Channel would be joint and several against DeBauche's "counsel of record" under 28 U.S.C. §1927. In doing so, the Court held that "it was evident that DeBauche was tying the private broadcasting defendants with a tenuous string to Virginia Commonwealth University to show they were exhibiting state action," and that "DeBauche's attorneys chose to overlook the one essential element of their multi-private defendant lawsuit, that is, there must be state action in the first

place." Mem. Op. at 19. The Court also held that DeBauche's case was "an unreasonable and intentional pursuit of a frivolous position which warrants an award under Section 1927 particularly in light of DeBauche's financial situation and the Court's question as to how her lawsuit has been funded." *Id.*

DeBauche and her attorneys appealed on the merits and regarding the fee award. The Fourth Circuit affirmed the dismissal of the Complaint. After a thorough review of the allegations and the law, the Fourth Circuit held that DeBauche failed to state a claim under 42 U.S.C. §1983 because it was "quite clear that the actions attributable to Wilder, WRVA, and WNVT amounted to their independently-motivated, private actions, rather than 'state action.'" 191 F.3d at 509.

Regarding the fee award, the Fourth Circuit affirmed the fee award under Section 1988 on the grounds that the "amended complaint that DeBauche filed makes it clear that the choice not to include DeBauche in Debate Virginia was made by Wilder, not by VCU, and it was not the product of any coercion by the state. Indeed, the invitations to the Republican and Democratic candidates were extended before VCU was even involved." *Id.* at 510. In response to DeBauche's argument that a fee award would chill future lawsuits by injured persons, the Court noted that "in the circumstances of this case, it can just as easily be argued that *groundless lawsuits like DeBauche's* might chill broadcasters' and other journalists' exercise of their First Amendment rights in organizing political debates." *Id.* (emphasis added).

The Fourth Circuit however, remanded the Section 1988 fee award to allow the Court to apportion the award between DeBauche and her attorneys based upon a consideration of DeBauche's financial condition.

> While we find no abuse of discretion in the decision to order DeBauche to pay fees and

> costs, we do believe that DeBauche's contention that her financial circumstances should be taken into account has merit...If the Court intended to split responsibility for paying fees and costs between DeBauche and her attorneys, it may do so on remand.

Id. at 511.

The Fourth Circuit reversed the award under Section 1927. Finally, the Fourth Circuit held that this Court could award fees under Rule 11:

> [The reversal of the fee award under Section 1927] is not to say, however, that the district court lacks authority to impose sanctions for the filing of a frivolous complaint. Federal Rule of Civil Procedure 11 allows sanctions against attorneys and parties who file pleadings that contain "claim [or] other legal contentions [that] are [not] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," or factual allegations that have neither evidentiary support nor the likelihood of forthcoming evidentiary support.
>
> Accordingly, we also vacate the sanctions imposed under § 1927 and remand to permit the district court to consider sanctions under Rule 11. Whether to impose Rule 11 sanctions, however, is committed to the discretion of the district court.

Id. at 512.[1]

ARGUMENT

I. The Court should apportion the Section 1988 fee award by holding DeBauche liable for 5% and her attorney's jointly and severally liable for 95% of the fee amount.

The Fourth Circuit affirmed this Court's award of attorney's fees and costs under Section 1988 but remanded the issue to allow this Court to consider the financial resources of DeBauche and , if necessary, split responsibility for payment of the fee award between DeBauche and their attorneys. 191 F.3d at 511. Clear Channel and CVETC urge the Court to require Debauche's attorneys to pay for the vast majority, or 95% of the fees.

By now it is clearly apparent that this lawsuit is not simply an outgrowth of DeBauche's desire to be Governor of Virginia. Instead, it is a well-orchestrated and well-funded attempt by the Reform Party, the Rutherford Institute and others to fulfill their political agenda regardless of the costs to private actors such as Clear Channel and CVETC. DeBauche's claims of poverty not only ring hollow, they are deliberately

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1 DeBauche has filed a Petition for Writ of Certiorari with the United States Supreme Court in which she seeks, among other things, a reversal of the Section 1988 fee award against DeBauche's attorneys on the grounds that Section 1988 allows for fee awards against parties only and not their attorneys. Unless and until that petition and appeal are resolved, this Court is bound by the Fourth circuit's determination that the Section 1988 award may be taxed to DeBauche's attorneys.

misleading when one considers the substantial legal team assembled on her behalf, and now on behalf of her attorneys:

> James J. Knicely of Knicely and Cotorceanu, P.C.;
>
> Thomas S. Neuberger, a legal specialist from Delaware;
>
> Jamin Raskin, a Professor at American University, Washington School of Law;
>
> John W. Whitehead of the Rutherford Institute in Charlottesville, Virginia, and his associate, Stephen H. Aden;[2]
>
> William Bradford Reynolds of Collier, Shannon, Rill & Scott, PLLC;[3] and
>
> Craig L. Parshall, a Fredericksburg, Virginia attorney.[4]

In light of DeBauche's claims of poverty, it is obvious that this lawsuit could be maintained only by a substantial infusion of

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2 The Rutherford Institute is perhaps best known for its representation of Paula Jones in her lawsuit against President Clinton.

3 Mr. Reynolds is the Reagan Administration's former Assistant Attorney General, Civil Rights Division, U.S. Department of Justice.

4 DeBauche also submitted an affidavit authored by Gary Leedes, a Professor of Law at T.C. Williams School of Law at the University of Richmond, Virginia.

money and intellect from the parties other than Ms. DeBauche.[5]

Moreover, whatever the nature of the support provided to DeBauche by her team of attorneys, it is clear that those attorneys have ample ability to pay 95% of the award. The financial statements of the Rutherford Institute, for example, demonstrate that as of June 30, 1998, shortly after this Court entered its fee award, the Rutherford Institute had over $2.7 million in net assets. (The financial statements will be provided to the Court before the hearing on March 9). The Rutherford Institute paid Whitehead and Aden total compensation of almost $279,000 during that year. In addition, her attorneys had the financial wherewithal to post a bond in the amount of $65,000 to cover any fee award in this case. It is clear that DeBauche's attorneys can well afford to pay 95% of the award.

This is not to say that DeBauche should be let off the hook entirely.[6] Even parties with few financial resources can be

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5 A fee award may be assessed against a non-party who is the "driving force" behind the litigation. In *Public Interest Bounty Hunters v. Board of Governors of the Federal Reserve System*, 548 F.Supp. 157 (N.D.Ga. 1982), an individual set up a trust, which then created an "instrumentality," Bounty Hunters, which served as the "nominal plaintiff" in a *qui tam* suit under the Federal False Claims Act, 31 U.S.C. § 231, *et seq*. The suit was similar to several other suits which had been brought by the individual, and the court held that "[t]here is no question but that [the individual] is the driving force behind this lawsuit, as he has been in his...individual lawsuits involving identical issues and claims, and that therefore attorney's fees can be assessed against him." *Id.* At 162. In this case, the substantial resources martialled by an allegedly impecunious plaintiff suggest that the Rutherford Institute and the Reform Party were the "driving force" behind plaintiff's suit.

6 Clear Channel will serve a subpoena on DeBauche's attorneys for certain billing statements to determine what DeBauche has paid in

liable for attorney's fee awards under Section 1988. See *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234 (5th Cir. 1990) (the financial condition of a non-prevailing plaintiff charged with attorney's fees under § 1988 is but one factor, and not the controlling factor, that a court should consider).

> The dual interests of equity and deterrence can be advanced without giving overriding consideration to the punitive value of a fee award, particularly when the reduced award still represents a substantial burden on the plaintiff and the defendant is fully capable of absorbing a reasonable share of its legal fees without hardship. When the plaintiff can afford to pay, however, the congressional goal of discouraging frivolous suits weighs heavily in favor of levying the full fees.

Arnold v. Burger King Corp., 719 F.2d 63, 68 (4th cir. 1983).

DeBauche alleged that she is "a business consultant and owner and operator of several small businesses." Complaint ¶5. She submitted an Affidavit to the Court stating that her income for 1995-97 was $43,000. Thus, she clearly has the financial ability to pay a portion of the fee award. Moreover, DeBauche voluntarily injected herself into the rough and tumble world of electoral politics. She represented to the voters of Virginia that she was capable of serving as the Commonwealth's chief executive, ran for governor on behalf of a large and well-funded political party, and voluntarily sought out conflict. No one compelled DeBauche to run for office or file lawsuits. Her conduct has caused CVETC and Clear Channel to lose real money, and she should be held accountable for her actions.

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this litigation. The documents received may be presented at the hearing scheduled for March 9, 2000.

Therefore, Clear Channel and CVETC suggest that the Court require DeBauche to pay 5% of the fee award.

II. This Court Should Use its Inherent Powers to Sanction Plaintiff's Counsel.

In order to ensure that DeBauche's attorneys are held responsible for this frivolous litigation, this Court should also sanction DeBauche and her attorneys under its inherent powers. As the Fourth Circuit has held, "[i]t is clear from the legal standards through which these sanctions [Rule 11, inherent power and 28 U.S.C. § 1927] operate that there can in many cases be significant overlap among them. In a proper case, several of the theories can be invoked to justify punishment of the same conduct." *Blue v. Dept. of Army*, 525, 914 F.2d 534 (4th Cir. 1990).[7]

Thus, this Court "possesses its own inherent power to sanction a litigant in addition to or instead of the sanctioning provisions of Rule 11." *Howell v. Nesbit*, 1998 U.S. App. LEXIS 12735 at *9 (4th cir. 1998) (unpublished).

> "[T]here are ample grounds for recognizing...that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel," even though the so-called "American Rule" prohibits fee shifting in most cases. As we

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7 In her brief to the Fourth Circuit, DeBauche recognized that she may be subject to sanction under this Court's inherent power or Federal Rule of Civil Procedure 11. *See* DeBauche Br. at 11 (citing *In re Keegan Management Securities Litigation*, 78 F.3d 431, 435 (9th Cir. 1996) for the proposition that "[t]he filing of a complaint may be sanctioned pursuant to Rule 11 or a court's inherent power").

> explained in Alyeska, these exceptions fall into three categories...Third, and most relevant here, a court may assess attorney's fees when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."...The imposition of sanctions in this instance transcends a court's equitable power concerning the relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of "vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy."

Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991) (*citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 259 (1975), other citations omitted).

The so-called "bad faith" category of inherent sanctions is not restricted to cases where an action is *filed* in bad faith, but also where it is *conducted* in bad faith. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Hall v. Cole*, 412 U.S. 1, 15 (1973). While a court may clearly tax counsel fees against a party who has litigated in bad faith, "it certainly may assess those expenses against *counsel* who willfully abuse judicial processes." *Roadway Express*, 447 U.S. at 766 (citation omitted) (emphasis added).

This Court held initially that plaintiff's counsel should be sanctioned for violating 28 U.S.C. § 1927, which proscribes an attorney from multiplying the proceedings in a case "unreasonably and vexatiously." On appeal, the Fourth Circuit did not dispute that DeBauche's attorney's acted unreasonably and vexatiously; indeed they urged the Court on remand to consider imposing Rule 11 sanctions against them "for the filing

of a frivolous complaint." 191 F.3d at 512. Instead, the Fourth Circuit disagreed that they multiplied the proceedings by filing a single complaint. *Id.*

Thus, the Fourth Circuit has, at least implicitly, acknowledged that plaintiff's counsel acted unreasonably and vexatiously in filing this lawsuit. It also explicitly held that their client's claim was "groundless and without foundation." 191 F.3d at 512. Either is sufficient to support an award of fees under the Court's inherent power.

Furthermore, the Fourth Circuit urged the imposition of Rule 11 sanctions against DeBauche's counsel. 191 F.3d at 512. As the Supreme Court held in *Chambers*, the bad faith standard resembles Rule 11's certification requirement. *Chambers*, 501 U.S. at 46 n.10. Thus, if DeBauche's attorneys violated Rule 11, they also were guilty of conduct that merits the imposition of the inherent disciplinary powers of this Court. Indeed, "Rule 11 'does not repeal or modify existing authority of federal courts to deal with abuses...under the court's inherent power.'" *Id.* at 48-49.

Reliance on inherent power as a sanction does not necessarily represent an "end run" around the notice requirements of Rule 11, especially when opposing counsel and the court have warned repeatedly that the conduct being sanctioned was at best questionable. *Chambers*, 501 U.S. at 45. In this litigation, counsel for defendants warned plaintiff's counsel repeatedly in pleadings, by letter and during telephone conversations that this action was unfounded and frivolous. The Court made similar statements during hearings and in its rulings. The fact that plaintiff's counsel "refused to be deterred" does not vitiate the Court's ability to impose sanctions based on its inherent powers. *Id.*

Accordingly, defendants urge the Court to impose, pursuant to its inherent powers, an award of their attorney's fees against DeBauche's attorneys.

Although the Fourth Circuit invited the Court to impose sanctions under Rule 11, such sanctions cannot benefit defendants. Defendants did not file a formal Rule 11 motion and thus, despite putting DeBauche on clear and unequivocal notice that her claim was frivolous and sanctionable, cannot be awarded fees and costs as a sanction under Rule 11. If this Court were to monetarily sanction DeBauche on its own initiative under Rule 11(c)(I)(B) as the Fourth Circuit suggests, the money would be paid into Court, not to defendants. *See Howell v. Nesbit*, 1998 U.S. App. LEXIS 12735 (4th Cir.1988) (unpublished)("Under [Rule 11(c)(1)(B)], sanctions may not be awarded to the Defendants").

In this case, however, the proper purpose of sanctions should be to compensate defendants for incurring hours of attorney's fees in response to frivolous, bad faith litigation prosecuted by no less than seven attorneys on behalf of an admittedly impecunious plaintiff. Thus, in order for a sanctions award to inure to the benefit of Clear Channel and CVETC, the Court should alternatively sanction DeBauche and her attorneys under its inherent power and award the benefit of such sanctions to Clear Channel and CVETC.

III. Clear Channel and CVETC are entitled to recover additional fees and costs.

Despite the frivolousness of this case, the award of fees to defendants, and DeBauche's claim of poverty, DeBauche and her attorney's have continued to vigorously litigate this matter on all fronts. As a result, Clear Channel and CVETC continue to spend money. As the Fourth Circuit has held, "it is well settled that the time spent defending entitlement to attorney's fees is properly compensable under § 1988." *Trimper v. City of Norfolk*, 58 F.3d 68, 76 (4th Cir. 1995). *See also Ganey v. Garrison*, 813 F.2d 650, 652 (4th Cir. 1987); *Daly v. Hill*, 790

F.2d 1071, 1080 (4th cir. 1986).

Thus, Clear Channel and CVETC are entitled to recover all fees spent preparing and defending their fee application, including the cost on remand. They will provide supporting materials for such fees to DeBauche by February 21, and will present their up-to-date time and expense records at the hearing.

CONCLUSION

For all these reasons, Clear Channel and CVETC respectfully request that the Court award costs and attorney's fees to Clear Channel and CVETC as set forth herein.

Respectfully submitted,
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